DEVELOPMENT & COMMERCIAL BANK (LTD) BHD.

v.

MPC HOLDINGS SDN. BHD.

HIGH COURT MALAYA, JOHOR BAHRU
MOHD. YUSOFF MOHAMED J
[ORIGINATING SUMMONS NO. 181/1981]
6 NOVEMBER 1982

LAND LAW: *Charged Land - Application for order of sale - Whether loan covered by charge - Whether tacking applicable - Effect of upstamping charge - Non-compliance with O. 83 rr. 3(1), (2).*

CIVIL PROCEDURE: *Application to be appointed sole representative of Committee of Creditors - Application for intervention as representative - Whether creditors had interest- Application for stay of proceedings - For proceedings to be continued by writ.*

COMPANY LAW: *Concept of company as a separate legal entity.*

The action was a foreclosure action, an application by the plaintiffs for the order of sale of a charged land belonging to the defendants. The application was by summons in chambers under s. 256 of the National Land Code, 1965. Also consolidated with the action were-

(i) application by the defendants that the proceedings be continued by writ;

(ii) application by Dato B. Bek Nielsen that he be appointed sole representative of the Committee of Creditors of the defendant's company, under O. 15, r. 12; and

(iii) Application for leave to intervene under O. 15 r. 6(2)(b)(i) the plaintiffs to be restrained from the sale of the land.

The defendants raised a number of preliminary points.

Held:

A. Preliminary points

[1] (a) Though the term loan of RM23,000,000 was made to a subsidiary of the defendants' company and though technically, the companies were two separate legal entities, for the purpose of incurring the loan they were the same companies and their separate legal entities should be ignored. Looking at the intent of the transaction, the loans were raised for the use of the defendant's company, and the notice of default under Form 16D on that company was not defective.

(b) Furthermore, the loan of RM23,000,000 was covered by the charge.

[2] Clauses 1 and 26 must be construed together to discover the intention of the parties. They could reasonably be construed as complementary to each other, and wide enough to cover past and future loans.

[3] Section 246 of the National Land Code applied to the upstamping of the charge from RM35,000,000 to RM61,000,000 for advances especially authorised by the prior charge. Tacking of advances is permitted under that section. Such upstamping is also allowed by s. 28(2) of the Stamp Ordinance 1949.

[4] Non-compliance with O. 83 r. 3 (1) and (2) of the Rules of the High Court 1980 was only an irregularity (O. 2, r. 1 (1) and did not nullify the proceedings.

B. Application for Intervention

(i) Application for appointment as sole representative granted.

(ii) Application to intervene must fail. None of the allegations made had been substantiated. The creditor's representative must establish sufficient interest directly affected by the action to intervene and this he had failed to do.

C. Application for stay of proceedings and continuance by writ

The application must be dismissed. The defendants must raise genuine issue of facts in order that the action should proceed by writ, and this they had failed to do.

[Plaintiffs' application allowed.]

Cases referred to:

The Roberta [1937] 58 L1 L Rep 159
H. Holdsworth, Ltd. v. Caddies [1959] 1 All ER 715
DHN v. Borough of Tower Hamlets [1976] 3 All ER 460
Pegang Mining Co. Ltd. v. Choong Sam & Ors. [1969] 2 MLJ 52
Abdul Majid v. Haji Abdul Razak [1971] 2 MLJ 228

Legislation referred to:

National Land Code 1965, ss. 246, 256
Rules of the High Court 1980, O. 2 r. 1(1), O. 15 r. 6(2)(b)(i), 12, O. 83 r. 3(1), (2)
Stamp Ordinance 1949, ss. 28(2), 52
Rules of the Supreme Court 1979 [UK], O. 16 r. 11

Other sources referred to:

Tenure and Land Dealings in the Malay States, David Wong p. 186

For the plaintiffs - Robert Alexander Gatehouse QC (K. Thayalan with him); M/s. Skrine & Co.
For the defendants - Colin Ross Monroe QC (R.D. Rajasingam & Narayangan with him); M/s. Lewis & Co.
For the intervener - Wong Seng Chow; M/s. Shearn Delamore & Co.

JUDGMENT

Mohd. Yusoff Mohamed J:

This is a foreclosure action, an application by the plaintiffs for the order of sale of a charged land belonging to the defendants. The application is by summons in chambers under s. 256 of the National Land Code 1965. Also consolidated with this action are:

(1) application by the defendants that these proceedings be continued as if the cause or matter had been begun by writ and that this Court gives directions on consequential pleadings;

(2) application by Dato B. Bek Nielsen that he be appointed as a sole representative of the Committee of Creditors of the defendants' company and

(3) another application by Dato B. Bek Nielsen for:

(i) an order that he be given leave to intervene in these proceedings;

(ii) the plaintiffs be restrained from proceedings with the sale of the said land.

In the plaintiffs' affidavit dated 11 June 1981, in support, of this action, the General Manager of the plaintiffs' company, Alexander Yu Lung Lee affirmed that on 23 February 1979, the defendants, as proprietors of the land, H.S. (D) 11230, Lot 413, Mukim of Tebrau, Johor Bahru,

created a charge of the land in favour of the plaintiffs in order to secure repayment on demand with interest of all monies due from time to time to the plaintiffs on current accounts operated by the defendants with the plaintiffs' bank.

On 23 April 1981, the defendants were owing the plaintiffs a sum of RM68,903,974. The notice of default in Form 16D was served on the defendants on 12 May 1981, but the defendants failed to remedy the breach as referred to in the notice at Exhibit AYLL4. He also affirmed that the plaintiffs by the sale of shares pledged to the bank, had realised a sum of RM2,494,856.86 and on 31 May 1981, the sum owing by the defendants to the plaintiffs was RM68,013,909 made up of the following:

1) Overdraft, Term Loan and Bill - Purchased		
i) Overdraft:		
Account 4432	RM23,993,297	
Account 4442	RM15,330,651	
ii) Term Loan	RM23,000,000	
iii) Bills purchased	RM 3,222,797	RM65,546,745
2) Contingent Liabilities		
i) Letter of Credit	194,514	
ii) Letters of Guarantee	2,272,650	RM 2,467,164
		RM68,013,909

On the date of hearing, that is, 17 October 1981, this sum has increased to 71 million dollars.

I will deal first with the preliminary points raised by the defendants' learned Counsel which are as follows:

(1) The 23 million dollar loan was never made to the defendants;

(1) (a) Whether this 23 million dollar loan was covered by the charge;

(2) Construction of the charge in particular, Clause 26 and basically the date of the charge, 5 March 1979, was for 32½ million dollars;

(3) The power to upstamp the charge and

(4) The plaintiffs have not complied to O. 83, r. 3(1) to (2), Rules of the High Court, 1980.

In arguing these points, the defendants' learned Counsel referred to Datuk Sharma's supplementary affidavit of 14 October 1981 and said that the notice of demand in Form 16D was incorrect and defective. He disputed that the term loan of 23 million dollars was made to the defendants but that it was granted to their subsidiary company called Tampoi Jaya Sdn. Bhd. He admitted that the security for the loan was on the first legal charge upon the same land belonging to the defendants as shown in a letter approving the credit facilities dated 27 February 1979 at Exhibit DKKS - 1. It was also admitted that the sum was drawn on 28 February 1979 and transferred to the defendants' accounts Nos. 4432 and 4442.

The plaintiffs' supplementary affidavit in reply dated 16 October 1981 affirmed that by a series of letters and documents at Exhibit AYLL - 9, it showed that the company, Tampoi Jaya had on the same day, 28 February 1979 passed a resolution to transfer their 23 million dollar loan

to the defendants' accounts. He also affirmed that because the charge on the said property was not executed, the plaintiffs on 4 July 1979 as at Exhibit D1 offered to re-structure the defendants' accounts including the 23 million dollar loan to be secured by this land and other shares. This he said was accepted by Datuk Sharma as Managing Director of the defendants' company on 13 July 1979. For these reasons, he said that the Tampoi Jaya's accounts with the plaintiffs' bank was non-operative after 28 February 1979 and subsequently closed by the plaintiffs.

The defendants' argument relied on technicalities of Company Law. But what are the facts and realities of the situation? It shows that the 23 million dollars lent to defendants' subsidiary, Tampoi Jaya were transferred to and used by the defendants' company. It was made on legal charge on the same land owned by the defendants as security for the loan. Further, from letters written by Tampoi Jaya and the defendants' company, both dated 1 June 1979 and resolutions dated 31 May 1979 and 7 July 1979 passed by Tampoi Jaya and the defendants' company respectively as at Exhibit AYLL - 9, it is observed that the Tampoi Jaya and the defendants' company operated their business from the same premises, the 16th Floor, Angkasa Raya, Jalan Ampang, Kuala Lumpur. The resolutions declaring the interest of their directors made by both companies also show that the same people operated both companies.

It is true that these two companies, Tampoi Jaya and the defendants' company were technically, two separate legal entities but for the purpose of incurring this term loan with the plaintiffs, they are no more separate but in name only. See *The Roberta* [1937] 58 L1 L Rep 159. To all intent, they were the same companies and in such a situation the Court would tend to ignore their separate legal entity and to look instead at the economic entity of the group of companies.

In *H. Holdsworth, Ltd. v. Caddies* [1955] 1 All ER 725 @ 737, Lord Reid, in a similar situation held that:

> It was argued that the subsidiary companies were separate legal entities, each under the control of its own Board of Directors, that in law the board of the appellant company could not assign any duties to any one in relation to the management of the subsidiary companies, and that, therefore, the agreement cannot be construed as entitling them to assign any such duties to the respondent.
>
> My Lords, in my judgment, this is too technical an argument. **This is an agreement in *re mercatoria,* and it must be construed in the light of the facts and realities of the situation.** (emphasis supplied)

In similar instance, Lord Denning in *DHN v. Borough of Tower Hamlets* [1976] 3 All ER 460 @ 467, held:

> We all know that in many respects a group of companies are treated together for the purpose of general accounts, balance sheet and profit and loss account. They are treated as one concern. Professor Gower in his book on company law says: 'there is evidence of a general tendency to ignore the separate legal entities of various companies within a group, and to look instead at the economic entity of the whole group. **This is especially the case when a parent company owns all the shares of the subsidiaries, so much so that it can control every movement of the subsidiaries.** These subsidiaries are bound hand and foot to the parent company and must do just what the parent company says ... So here. This group is virtually the same as a partnership in which all the three companies are partners. **They should not be treated separately so as to be defeated on a technical point."** (My emphasis).

In the present case, the defendants' company, being the parent company, seemed to have absolute control of this subsidiary, Tampoi Jaya, and looking at the intent of the transaction, the effective loan of 23 million dollars was raised for the use of the defendants' company. For these reasons, in my view, the notice of default under Form 16D dated 11 May 1981 cannot be defective.

On preliminary point 1(a), the argument advanced by the learned Counsel was that the loan of 23 million dollars was not covered by the charge because the plaintiffs signed the charge on 5 March 1979 whereas the loan was granted on 1 March 1979. He therefore said that during the intervening period, the loan being a new loan, was not covered by the charge.

The charge at Exh. AYLL1 shows that both parties signed it on 23 February 1979. This was attested to by an Advocate and Solicitor on the 5 March 1979. It is not correct to say that the plaintiffs signed the charge on 5 March 1979. It was arguable whether the charge would take effect on 23 February 1979, the date when it was signed or or 5 March 1979, the date it was attested. But, in my opinion, it does not give rise to the proposition that the loan was a new loan. This argument was hypothetical in assuming that the loan was made on 1 March 1979 when it was not and I do not think it necessary to make a decision on it.

Another point also raised at this juncture was that as on 15 December 1978, the charge was upstamped to 35 million dollars and as evidenced from the agreement dated 7 February 1979 at Exhibit DBBN5, the loan already granted to the defendants then was RM31¼ million. It was argued that this additional loan of 23 million dollars was not therefore, covered by the charge. On this point I would agree with the plaintiffs' Counsel that s. 52 of the Stamp Ordinance 1949 gives discretion to Collector of Stamp Duties to impose a penalty and impound such document if he found it necessary. It is not relevant now for defendants to take issue on the powers exercisable by the Collector when the charge has subsequently been upstamped to include this loan.

On preliminary point 2, it was contended that Clause 26 of the charge used the words "such additional facilities to be granted." These words, it was argued, speak of future loans or advances and Clause 1 speaks of "existing facilities and to grant increased credit facilities to the chargor" which purports to cover past and future debts. In these contexts, it was pointed out that there was inconsistency between Clause 1 and Clause 26 and it was urged that Clause 26 should take precedence because it is directed to actual facts.

My view on this is that such an interpretation of Clause 1 and Clause 26 by interpolating words in each clause and reading them out of context is not reasonable. The proper construction is of course, to construe the intention of the parties. In my view there is no inconsistency in both Clause 1 and Clause 26. Both clauses could reasonably be construed as complementary to each other and the intention of the parties was to make the transaction flexible, wide enough to cover past and future loans to be granted to the defendants.

On point 3, the power to upstamp the charge, the defendants' learned Counsel contended that there was no such power to upstamp a charge in the National Land Code. He said s. 246 of the National Land Code was not applicable which section envisaged a third party involved in the transaction. He submitted that tacking of further advances was an English principle in advances and not in the charges of lands.

The power of tacking the loan to 61 million dollars was given by the resolution of the defendants' company dated 1 November 1980 to the plaintiffs - See Exh. AYLL10. On the law of upstamping the charge, in my opinion, s. 246 of the National Land Code would seem to apply. Tacking of advances is an innovation and allowed by that provision of the Code in situations such as:

(a) where the making of the advances were especially authorised by the prior charge or;

(b) (not applicable);

(c) where the advances were made by consent of person entitled to benefit of the subsequent charge.

These are advantages for the purpose of facilitating the use of charges for securing overdrafts - see David Wong on "*Tenure and Land Dealings in the Malay States*" at p. 186. Upstamping of this charge was for advances especially authorised by the prior charge. This is evidenced in Clause 26 of the charge document and resolution of the defendants' company dated 1 November, 1980 and therefore within the provision of the section.

An alternative point also raised with regard to upstamping the charge from 35 million dollars to 61 million dollars, was later conceded by the defendants' learned Counsel that s. 28(2) of the Stamp Ordinance 1949 allowed such a procedure.

Preliminary point 4, the objection on non-compliance with O. 83, r. 3 (1) and (2) of the Rules of the High Court, 1980, in not exhibiting the original charge, was also conceded that this is only an irregularity - see O. 2, r. 1 (1) of Rules of the High Court and therefore it does not nullify these proceedings.

Having disposed of the preliminary objections, I will deal next with the application for intervention at enClause (13) by Dato B. Bek Nielsen representative of the Committee of Creditors of the defendants' company to restrain the plaintiffs from the sale of the said land. His application at enClause (15) to appoint himself as sole representative of the Committee of Creditors of the defendants' company, under O. 15, r. 12 of the Rules of the High Court, met with no objection from all the parties and it was granted in terms of the application.

The ground of his application to intervene is mainly based on the defendants and their director's guarantee to pay their unsecured creditors, debts which he said, were in excess of the defendants' group of companies' assets. He alleged that by a series of representations by the defendants which resulted in the agreement at DBBN1 and by exchange of letters dated 16 December 1978 (DBBN3) and 17 January 1979 (DBBN4) between him and the plaintiffs, there was a firm contract with the creditors which the plaintiffs have breached. It was also alleged that the plaintiffs had committed fraudulent preference against the unsecured creditors by upstamping the charge to 61 million dollars without the consent of the creditors.

Firstly, the representation by the defendants. The representation referred to is Clause 9(b) of the agreement dated 1 October 1977 (DBBN1) between the defendants and their director as guarantor in one part with the creditors in the other, on the term that the defendants would not sell or in any way diminish the assets of the defendants' company. The plaintiffs were not parties to the agreement. However, from the reading of Clause 9(b)(i), it does not seem that the present charge of the land by the defendants to the plaintiffs contravenes this clause. The proviso in this clause exempts existing facilities granted by a duly licensed bank or to further facilities granted pursuant to existing charge, to the defendants. Both these provisos apply to the plaintiffs. In my view, there was no wrongful representation as alleged even assuming that the agreement of Exhibit DBBN1 binds the plaintiffs which is not.

Secondly, the exchange of letters. There does not appear to exist a definite offer made by the plaintiffs in their letter of 16 December 1978 (DBBN3) to the creditors except probably for their voluntary declaration to hold all surplus assets and monies in trust for these unsecured creditors. In this respect, I would agree with the plaintiffs' learned Counsel that this letter was only meant to be a progress report to the unsecured creditors of the result of

a meeting held between the plaintiffs and the creditors' representative on 30 November 1978 suggesting a scheme for repayment of the defendants' debts. From the comment made by the creditors' representative at para. 3 of his letter dated 17 January 1979, doubting the success of the scheme, clearly indicates that it was not possible for the creditors to draw a contractual offer from the plaintiffs' letter.

There remains, the allegation of breach of trust in the same letter at Exh. DBBN3 by the plaintiffs. This, in my view, is not a properly constituted trust. The letter was a mere declaration of intention on the part of the plaintiffs of creating a trust as part of the scheme for payment of the defendants' debts to the plaintiffs as well as to the unsecured creditors from surplus assets obtainable from the charged land. The scheme was aborted and the trust property was not then ascertainable. The trust intended was not duly perfected. It contemplated further acts for the purpose of giving its completion. I am of the view that such a bare declaration of trust is not enforceable and therefore no breach has arisen.

The agreement dated 7 February 1979 (DBBN5) referring to the declaration of trust, was concluded between the plaintiffs and the director of the defendants' company, guaranteeing the debts incurred by the defendants to the plaintiffs. This agreement was drawn pursuant to the scheme for payment which was aborted. The creditors are not parties to this agreement, and I consider that the agreement is not relevant for consideration of this application by the creditors' representative.

The question now, is whether from this document (DBBN1) and an exchange of letters (DBBN3 and 4), the creditors' representative has established sufficient interest directly affected by this action to intervene.

Order 15 r. 6(2) (b) (i) of the Rules of the High Court 1980 states:

> 6.(2) At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application:
>
> (b) order any of the following persons to be added as a party, namely:
>
> (i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, or

This rule is in the same terms as the former O. 16 r. 11 of the English Rules of the Supreme Court 1979. In *Pegang Mining Co. Ltd. v. Choong Sam & Ors.* [1969] 2 MLJ 52 PC Lord Diplock at p. 55 says:

> To come within the words of the rule the party to be added must be one 'who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter.

In that case the rights of the contractor (intervener) under the provision of the agreement depended upon the result of the action brought by the sub-sub-lessee against the company and the sub-lessees. If she(the sub-sub-lessee) succeeded in her claim she would be entitled as sub-sub-lessee to mining rights over the disputed parcels of land which the company had acquired. The contractor would in turn be entitled to enter upon the disputed parcels of land and win the minerals thereon ... If on the other hand she failed in her claim, the contractor would have no right to enter on the new parcels at all or to work or win any minerals on them.

The intervener succeeded in that case to join himself as a party. It was held:

> *Per Curiam:* "It has sometimes been said that a party may be added if his legal interests will be affected by the judgment in the action but not if his commercial interests only would be affected. While their Lordships agree that the mere fact that a person is likely to be better off financially if a case is decided one way rather than another is not a sufficient ground to entitle him to be added as a party; they do not find the dichotomy between 'legal' and 'commercial' interest helpful. A better way of expressing **the test is: will his rights against or liabilities to any party to the action in respect of the subject matter of the action be directly affected by any order which may be made in the action?** (emphasis supplied)

The facts of the case here are distinguishable with *Pegang's* case in that there, the contractor (intervener) would be entitled to rights under a written agreement to enter and work the disputed land, depending on the outcome of the case. This was construed as interest directly affected by the order which may be made in the action. Whereas in the present case, the unsecured creditors have none of those rights.

Another allegation made by the creditors' representatives was that the plaintiffs had committed fraudulent preference against the unsecured creditors. In short I would say that the defendants' company was not under liquidation which the term applies and the allegation does not therefore arise. In these circumstances, in my opinion, the intervener's application would fail.

I will now deal with the defendants' application at Encl. (17) for stay of proceedings and that these proceedings be continued by Writ.

The defendants' learned Counsel, in his argument raised many triable issues and complex points of law to be decided depending upon disputed findings of facts. But relying on the defendants' affidavit at enClause (18), it seems to me that there are only two issues material to these proceedings. Other points raised are not to my mind relevant. One of these allegations is the purported fraudulent misrepresentation by the plaintiffs based on his letter dated 16 December 1978 (DBBN3) without which it was alleged that, the unsecured creditors would not consent to the defendants signing the agreement of guarantee dated 7 February 1979 (DBBN5), and in that event, the defendants would not have signed it (para. 5 of the affidavit). Another allegation is that the plaintiffs had induced the defendants to consent to upstamp the charge to 61 million dollars by representing that it was made only in form and not to be acted upon in order to satisfy the Bank Negara's requirements (para. 9 of the affidavit).

The defendants relied on *Abdul Majid v. Haji Abdul Razak* [1971] 2 MLJ 228 to support the proposition that the Courts would refuse to decide questions of fact on an originating summons as a matter of some inconvenience. As a mater of law, I would agree that where there is a dispute of facts, it necessarily calls for evidence to be taken and trial by affidavits would not be proper.

However, the defendants' application, here relies extensively on the affidavits of the intervener's application, that is, the letters dated 16 December 1978 and 17 January 1979 (DBBN3 and 4). I have held that it was not possible to draw a contractual offer from the letter at DBBN3 and neither is the letter at DBBN-4 was an acceptance of any offer from the plaintiffs by the unsecured creditors. In any event, the consent of the unsecured creditors to the defendants signing of agreement guaranteeing its own debts to the plaintiffs was not relevant to the issue between the plaintiffs and the defendants and in my opinion, the alleged representation is immaterial whether misrepresented or not.

On the second purported misrepresentation that the plaintiffs had induced the defendants to consent to upstamping the charge 61 million dollars, it is to be noted that it was never disputed that on the date of upstamping, the defendants owned the plaintiffs a total sum of 61 million dollars. In view of the personal guarantee by the director of the defendants' company dated 7 February 1979 to pay the sum owed to the plaintiffs, it would be in my opinion, preposterous in nature that the plaintiffs should find it necessary to represent that it would not act upon the charge so upstamped, considering that it had to spend money on upstamping fee. As evidenced from the defendants' company's own record at AYLL10, this upstamping was approved by their own resolution of 1 November 1980. It is not reasonable that such a serious allegation as this was pursued only at this last moment. The probability is that the alleged representation was not made.

In my opinion, the defendants do not raise any genuine issue of facts in order that the present action should proceed by Writ. In these circumstances I would also dismiss the defendants' application.

Now, having decided all the objections to this action in favour of the plaintiffs, they are in my opinion, entitled to the order they seek, which I accordingly order in terms of their application.

Also found at [1983] 1 CLJ 195